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IN THE

Supreme Court of the United States

October Term, 1973

No. 73-603

CARMINE TRAMUNTI,

Petitioner,

against

HONORABLE ARNOLD BAUMAN, United States District Judge for the Southern District of New York; PAUL J. CURRAN, United States Attorney for the Southern District of New York; and the UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE

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No.

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HONORABLE ARNOLD BAUMAN, United States District Judge for the Southern District of New York; PAUL J. CURRAN, United States Attorney for the Southern District of New York; and the UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Carmine Tramunti prays that a writ of certiorari issue to review the orders of the United States Court of Appeals for the Second Circuit entered in this case on August 24, 1973.

Opinion Below

No opinion has been rendered or filed by the Court of Appeals in this case. The orders dismissing the petition and for a stay of proceedings are reprinted as Appendix "A" hereto, *infra.*

Jurisdiction

The orders of the Court of Appeals were entered on August 24, 1973. The jurisdiction of this Court is invoked under Title 28, United States Code §1254 (1).

Questions Presented

1. Whether in light of *Ashe* v. *Swenson*, 397 U. S. 436 (1970) it is constitutionally impermissible under the double jeopardy clause of the Fifth Amendment and the rules of collateral estoppel to prosecute petitioner for perjury for having simply denied his involvement in a securities fraud prosecution in which he was acquitted.

2. Whether the Court of Appeals failed to afford petitioner a fair hearing of his petition for a writ of prohibition when it failed to follow the requirements of *Ashe* v. *Swenson*, 397 U. S. 436 (1970), by denying said petition without having before it or considering the complete record of petitioner's securities fraud prosecution and further by denying petitioner's motion to compel the filing of said complete record.

Constitutional Provision, Statute and Rules Involved

CONSTITUTION OF THE UNITED STATES, FIFTH AMENDMENT

> "nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb;"

UNITED STATES CODE—TITLE 28

§1651—Writs

(a) The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

(b) An alternative writ or rule nisi may be issued by a justice or judge of a court which has jurisdiction.

FEDERAL RULES OF APPELLATE PROCEDURE

Rule 21. Writs of Mandamus and Prohibition Directed to a Judge or Judges and Other Extraordinary Writs.

(a) Mandamus or Prohibition to a Judge or Judges: Petition for Writ; Service and Filing. Application for a writ of mandamus or of prohibition directed to a judge or judges shall be made by filing a petition therefor with the clerk of the court of appeals with proof of service on the respondent judge or judges and on all parties to the action in the trial court. The petition shall contain a statement of the facts necessary to an understanding of the issues presented by the application; a statement of the issues presented and of the relief sought; a statement of the reasons why the writ should issue; and copies of any order or opinion or parts of the record which may be essential to an understanding of the matters set forth in the petition. Upon receipt of the prescribed docket fee, the clerk shall docket the petition and submit it to the court.

(b) Denial; Order Directing Answer. If the court is of the opinion that the writ should not be granted, it shall deny the petition. Otherwise, it shall order that an answer to the petition be filed by the respondents within the time fixed by the order. The order shall be served by the clerk on the judge or judges named respondents and on all other parties to the action in the trial court. All parties below other than the petitioner shall also be deemed respondents for all purposes. Two or more respondents may answer jointly. If the judge or judges named respondents do not desire to appear in the proceeding, they

may so advise the clerk and all parties by letter, but the petition shall not thereby be taken as admitted. The clerk shall advise the parties of the dates on which briefs are to be filed, if briefs are required, and of the date of oral argument. The proceeding shall be given preference over ordinary civil cases.

Rule 27. Motions

(a) Content of Motions; Response; Reply. Unless another form is elsewhere prescribed by these rules, an application for an order or other relief shall be made by filing a motion for such order or relief with proof of service on all other parties. The motion shall contain or be accompanied by any matter required by a specific provision of these rules governing such a motion, shall state with particularity the grounds on which it is based, and shall set forth the order or relief sought. If a motion is supported by briefs, affidavits or other papers, they shall be served and filed with the motion. Any party may file a response in opposition to a motion other than one for a procedural order (for which see subdivision (b)) within 7 days after service of the motion, but motions authorized by Rules 8, 9, 18 and 41 may be acted upon after reasonable notice, and the court may shorten or extend the time for responding to any motion.

Statement of the Case

The Petition

In this case a petition was filed pursuant to Title 28, United States Code, §1651 and Rule 21, Federal Rules of Appellate Procedure, in the United States Court of Appeals for the Second Circuit, seeking a writ in the nature of a writ of prohibition against the respondents and for an alternative writ dismissing a perjury indict-

ment filed against petitioner in the United States District Court for the Southern District of New York, bearing Docket No. 73 Cr. 514. Coupled with the petition was a motion to compel the filing in the Court of Appeals of a complete copy of the entire record of the first or securities fraud prosecution against petitioner and numerous co-defendants, held also in the Southern District of New York, bearing Docket No. 70 Cr. 967, at which petitioner was acquitted of all charges. Petitioner also moved separately in the Court of Appeals for a temporary restraining order of the perjury prosecution pending the hearing and final determination of the petition.

The petition (which has been reprinted as Appendix "B" hereto), alleged in substance that the perjury prosecution was being conducted in violation of "the privilege of petitioner guaranteed by the Fifth Amendment to the Constitution of the United States, not to be subject for the same offense to be twice put in jeopardy of life or limb, and the rules of law against double jeopardy, collateral estoppel and res judicata, or by whatever other name or term the foregoing Fifth Amendment prohibition shall apply." It alleged that on May 31, 1973, an indictment was filed against petitioner in the Southern District of New York (No. 73 Cr. 514), charging seven counts of perjury. The essence of the perjury counts was that on December 14, 1971, when petitioner testified as a witness in his own defense in the securities fraud trial of No. 70 Cr. 967, he testified falsely as to his acquaintance or knowledge of certain persons, of his attendance at a luncheon meeting in a New York restaurant and of his receipt of a bottle of liquor from one of these persons at a hotel night club.

At the securities fraud trial, two certain witnesses, co-defendant Murray Taylor and co-conspirator John Kelsey, testified to the effect that petitioner attended a certain meet-

ing at Gatsby's Restaurant on East 41st Street, New York City, in late October or early November 1969; that petitioner knew co-defendants Michael Hellerman, Murray Taylor, Vincent Gugliaro, Philip Bonadonna, and co-conspirator John Kelsey, prior to the indictment in said case; and that petitioner met and received a bottle of liquor from Hellerman, in the presence of Kelsey, at the Americana Hotel in New York City, in November 1969. Petitioner specifically denied the testimony of these witnesses, and was acquitted of the securities fraud charges.

Petitioner also incorporated by reference into the petition all of the proceedings in the securities fraud trial, as well as including a motion that a complete copy of those proceedings be filed with the Court of Appeals for its use in considering and determining the petition for a writ of prohibition. Parenthetically, this was never done. Petitioner also sought a temporary stay of the perjury trial "pending the hearing and determination of this petition."

The Record

The record of the Court of Appeals consists of the petition, with exhibits annexed; the motion for a temporary stay with supporting affidavit; and the orders denying the petition and motion for temporary stay. These documents are reprinted as appendices to this petition. There was no response called for or filed by any of the respondents.

Although the complete record and proceedings of the securities fraud trial were incorporated by reference into the petition, no copy of such record and proceedings was filed with or submitted to the Court of Appeals.

The Facts

The facts in this proceeding disclose that in the securities fraud prosecution, petitioner was indicted with a mass

of co-defendants, with many other named co-conspirators, of conspiracy to violate the securities and mail fraud statutes, as well as numerous substantive counts in the alleged sale of Imperial Investment Company stock. Said indictment contained 72 counts, with petitioner named in 43 counts (See Exhibit B, attached to the petition for a writ of prohibition, Appendix B, reprinted *infra.*) In the conspiracy count, it was alleged in Overt Act No. 6:

> "On or about November, 1969 defendants Carmine Tramunti and Vincent Gugliaro were at 20 East 41st Street, New York, New York."

This is the only overt act in which petitioner was named. The address, 20 East 41st Street, was the then location of Gatsby's Restaurant.

At the trial, which lasted about thirteen weeks, only two witnesses, Taylor and Kelsey, gave any testimony purporting to link petitioner with the case. The trial transcript of their testimony sets forth in detail two occasions when they claimed petitioner met other defendants, the Gatsby Restaurant luncheon and the Americana Hotel night club. Both witnesses testified that petitioner was present at the luncheon with other named co-defendants, while Kelsey alone mentioned the hotel occasion. There was no other proof or evidence from any other person or source linking petitioner with the charges of the indictment.

In his own defense petitioner testified that prior to the indictment he had not met certain defendants, Taylor, Hellerman, Gugliaro and Bonadonna, and co-conspirator Kelsey. He denied attending the Gatsby's Restaurant luncheon at which Taylor, Gugliaro, Bonadonna and Kelsey purportedly were present. This was the meeting alleged in Overt Act No. 6 of the conspiracy count. He denied meeting and receiving from Hellerman a gift bottle of

liquor at the Americana Hotel, although he acknowledged being at that hotel. His testimony was in direct contradiction to that proffered by Taylor and Kelsey. He denied any connection or participation in the charges of the indictment. He called no other witness to support his testimony.

Parenthetically, the government called Mrs. Kelsey to support her husband's testimony. She was asked to pick out in the courtroom the man to whom Hellerman allegedly sent the bottle of liquor at the Americana Hotel. She failed to select petitioner.

Thus, the issues in the securities fraud prosecution as to petitioner were his membership and participation in the alleged securities fraud and his aiding and abetting in the substantive violations. Principal among the fact issues were the allegations of Overt Act No. 6, *supra,* as to whether petitioner was present at the Gatsby's Restaurant luncheon and met Taylor, Kelsey, Gugliaro and Bonadonna thereat. These were the ultimate issues which were necessarily litigated and necessarily determined in said prosecution. The sole evidence to support these charges against petitioner was, as is set forth here, the testimony of Taylor and Kelsey. The jury chose to disbelieve these witnesses, and to believe petitioner's denials. His acquittal followed.

Not satisfied with this judgment of acquittal, the government now chooses to prosecute petitioner for perjury for having denied under oath his participation in and guilt of the securities fraud charges. The proof necessary to support these charges is the same testimony which was used and available against petitioner at the securities fraud trial.

The perjury indictment (which is reprinted *infra* as Exhibit A, attached to the petition for a writ of prohibi-

tion, Appendix B) contains seven counts. In substance, these counts charge perjury as follows:

Count 1: Denial of knowing Michael Hellerman.

Count 2: Denial of knowing John Kelsey.

Count 3: Denial of knowing Murray Taylor.

Count 4: Denial of knowing Vincent Gugliaro.

Count 5: Denial of knowing Philip Bonadonna.

Count 6: Denial of attending Gatsby's Restaurant meeting.

Count 7: Denial of receiving bottle of liquor from Hellerman at Americana Hotel.

The pleaded excerpts from petitioner's trial testimony, which is alleged to be false and perjurious, consist of his denials of attendance at the Gatsby's Restaurant luncheon and at the Americana Hotel night club. These excerpts are used to spell out in each perjury count the allegations of falsity, contrary to the jury's verdict of acquittal sustaining that testimony.

The petition for a writ of prohibition seeks to forestall and prevent this second prosecution under the constitutional prohibition against double jeopardy and the rules of law defining collateral estoppel. However, the Court of Appeals declined to consider the petition on its merits.

Reasons for Granting the Writ

The issues in this case are of substantial constitutional importance, relating to the efficacy and construction of the double jeopardy provision of the Fifth Amendment and the rules of law defining collateral estoppel, and to

the procedures to be used to enforce rights arising thereunder.

1. In light of *Ashe* v. *Swenson,* 397 U. S. 436 (1970), it is constitutionally impermissible under the double jeopardy clause of the Fifth Amendment and the rules of collateral estoppel to prosecute petitioner for perjury for having simply denied his involvement in a securities fraud prosecution in which he was acquitted.

The decision in *Ashe* v. *Swenson, supra,* was unquestionably intended by this Court to halt successive prosecutions of defendants where the essential ultimate fact issues of the second prosecution were necessarily litigated and necessarily determined in the first prosecution. The ancient rule of double jeopardy turned on the "same offense" or "same evidence" test, while the modern rule of collateral estoppel encompasses a meaningful inquiry, "not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, with realism and rationality" (*ibid,* p. 444), into the necessarily litigated and necessarily determined ultimate fact issues. Any application of the rule more restrictive than that restated or formulated by this Court in *Ashe,* does violence and harm to its concept.

There is nothing more devastating to a person charged wih crime, who manages to be acquitted, than to have his acquittal collaterally attacked by a prosecution for perjury simply because he denied under oath his alleged participation in the first case. One of the gravest consequences of such perjury prosecutions is the "chilling effect" they have upon the defendant's exercise of his unquestioned and undoubted constitutional right to testify in his own defense at the trial. Defendants will somehow be forwarned that by testifying and simply denying the charges, an acquittal will be the catalyst for a perjury

prosecution. Such practice by the government, with its unlimited resources, against the individual defendant, is in derogation and violation of concepts of fundamental due process and fundamental fairness; it amounts to oppressive prosecution. Cf. *Benton* v. *Maryland,* 395 U. S. 784 (1969).

In this case petitioner did no more at the first trial than to deny his acquaintance with and knowledge of certain co-defendants and a co-conspirator, and of attending at two particular places. His testimony amounted to no more than a simple denal of two witnesses' testimony that he knew the particular persons and did attend the two places. Thus, there was a direct confrontation of testimony between the government witnesses and petitioner; it was a jury question of the ultimate facts upon which the allegation of petitioner's participation in the crimes charged was based. The jury, by its general verdict of "not guilty", chose to believe petitioner; those issues of ultimate fact cannot now be retried or re-examined in the guise of a perjury prosecution, through the use of the same evidence used or available for use at the first trial.

To permit the government to relitigate determined issues by such perjury prosecutions is to undercut and destroy the carefully woven fabric of collateral estoppel which this Court fashioned over many years until its final formulation in *Ashe* v. *Swenson, supra.* The Court should not allow this to happen.

2. The Court of Appeals failed to afford petitioner a fair hearing of his petition for a writ of prohibition when it failed to follow the requirements of *Ashe* v. *Swenson,* 397 U. S. 436 (1970), by denying said petition without having before it or considering the complete record of petitioner's securities fraud prosecution and

further by denying petitioner's motion to compel the filing of said complete record.

Even from the limited record of this proceeding before this Court (see p. 6 *supra*), the conclusion is nevertheless inescapable that the Court of Appeals has somehow foresworn or abrogated its duty to examine the complete proceedings of the securities fraud trial to determine whether the perjury prosecution is barred under the principles of collateral estoppel as included within the constitutional bar of double jeopardy. This Court restated the criteria for examining into the question of the applicability of collateral estoppel in its opinion in *Ashe* v. *Swenson, supra,* p. 444:

> "The federal decisions have made clear that the rule of collateral estoppel in criminal cases is not to be applied with the hypertechnical and archaic approach of a 19th century pleading book, but with realism and rationality. Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to 'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge, and other relevant matter, and conclude whether a rational jury could have grounded its verdict upon an issue other than that which the defendant seeks to foreclose from consideration.' The inquiry 'must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings.' *Sealfon* v. *United States,* 332 U. S. 575, 579. Any test more technically restrictive would, of course, simply amount to a rejection of the rule of collateral estoppel in criminal proceedings, at least in every case where the first judgment was based upon a general verdict of acquittal." (Footnote omitted)

The denial by the Court of Appeals of petitioner's motion to compel the filing with it of the complete proceedings in the first securities fraud trial, including the trial transcript, exhibits and other proceedings, and its dismissal of the petition at the same time (see Appendix A, *infra*), is a clear and uncontestable demonstration of the fact that there was no examination by said Court of the prior proceedings to determine if the perjury prosecution could be sustained. The fact that petitioner may be able to demonstrate at the second or perjury trial that the government is relying upon the same evidence adduced or available to it at the securities fraud trial to try to sustain its burden of proof in the perjury trial[1], does not excuse the obvious failure of the Court of Appeals to consider and apply this Court's rules for enforcing the constitutional mandate that no person shall "be subject for the same offence to be twice put in jeopardy of life or limb" (Fifth Amendment), by forestalling and precluding the holding of such second trial. *Downum* v. *United States*, 372 U. S. 734, 736 (1963); *Harris* v. *Washington*, 404 U. S. 55, 56 (1971).

Thus, in any event, the petition for a writ of certiorari should be granted, at least to the extent of remanding this proceeding to the Court of Appeals to make the mandated determination of collateral estoppel required by *Ashe* v. *Swenson*, *supra*.

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1. See, however, *United States* v. *De Angelo*, 138 F 2d 466 (3rd Cir. 1943); *Yawn* v. *United States*, 244 F 2d 235 (5th Cir. 1957); *United States* v. *Kramer*, 289 F 2d 909 (2nd Cir. 1961), as to the admissibility at the second trial of evidence determining ultimate facts at the first trial; Mayers & Yarbrough, *Bis Vexari*: New Trials and Successive Prosecutions, 74 Harvard Law Review 1, 38-39 (1960).

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Respectfully submitted,

MURRAY J. CHIKOFSKY,
Counsel for Petitioner

FRIEDMANN, FISCHMAN & CHIKOFSKY
Of Counsel

October 1, 1973.

APPENDIX "A"

Order Denying Petition and for Stay of Trial

73-2128

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

CARMINE TRAMUNTI,

Petitioner,

v.

HONORABLE ARNOLD BAUMAN, United States District Judge for the Southern District of New York; PAUL J. CURRAN, United States Attorney for the Southern District of New York; and the UNITED STATES OF AMERICA,

Respondent.

UNITED STATES OF AMERICA,

Plaintiff,

v.

CARMINE TRAMUNTI,

Defendant.

A petition for a writ of prohibition or, in the alternative, for an order directing the United States District Court for the Southern District of New York to dismiss the indictment filed there under Docket No. 73-CR514 having been filed together with a motion for a stay, with an order directing the United States Attorney for the Southern District of New York (appellee) to file the record filed in that District Court under Docket No. 70CR 967.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

Ordered that a stay pending determination of said petition and it hereby is denied.

WILLIAM H. MULLIGAN
JAMES L. OAKES
WILLIAM H. TIMBERS

August 24, 1973

Order Denying Motion to File Record

D-7
73-2128

UNITED STATES COURT OF APPEALS

SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the day of , one thousand nine hundred and .

CARMINE TRAMUNTI,

Petitioner,

v.

HONORABLE ARNOLD BAUMAN, United States District Judge for the Southern District of New York; PAUL J. CURRAN, United States Attorney for the Southern District of New York; and the UNITED STATES OF AMERICA,

Respondent.

UNITED STATES OF AMERICA,

Plaintiff,

v.

CARMINE TRAMUNTI,

Defendant.

It is hereby ordered that the motion made herein by counsel for the appellant by notice of motion dated August 2, 1973, for an order directing appellee to file the entire record of the first trial filed in the United States District Court for the Southern District of New York under Docket No. 70 CR 967 be and it hereby is denied.

WILLIAM H. MULLIGAN
JAMES L. OAKES
WILLIAM H. TIMBERS
Circuit Judges

August 24, 1973

Order Denying Motion to Dismiss Indictment

73-2128
D-6

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the day of , one thousand nine hundred and .

CARMINE TRAMUNTI,

Petitioner,

v.

HONORABLE ARNOLD BAUMAN, United States District Judge for the Southern District of New York; PAUL J. CURRAN, United States Attorney for the Southern District of New York; and the UNITED STATES OF AMERICA,

Respondent.

UNITED STATES OF AMERICA,

Plaintiff,

v.

CARMINE TRAMUNTI,

Defendant.

It is hereby ordered that the motion made herein by Counsel for the appellant by notice of motion dated July 26, 1973, for an order directing the United States District Court for the Southern District of New York to dismiss the indictment filed there as Docket No. 73 CR 514 be and it hereby is denied.

WILLIAM H. MULLIGAN
JAMES L. OAKES
WILLIAM H. TIMBERS
Circuit Judges

August 24, 1973

APPENDIX "B"

Petition for a Writ of Prohibition

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CARMINE TRAMUNTI,

Petitioner,

—v—

HONORABLE ARNOLD BAUMAN, United States District Judge for the Southern District of New York; PAUL J. CURRAN, United States Attorney for the Southern District of New York; and the UNITED STATES OF AMERICA,

Respondents.

To the Honorable Chief Judge and Circuit Judges of the United States Court of Appeals for the Second Circuit:

The petition of Carmine Tramunti, by Friedmann, Fischman and Chikofsky, his attorneys, respectfully alleges:

1. Petitioner resides at No. 145-79 6th Avenue, Whitestone, New York 11357.

2. This petition is filed pursuant to the provisions of Title 28, United States Code, §1651 and Rule 21, Federal Rules of Appellate Procedure, seeking a writ in the nature of a writ of prohibition against the respondents named herein, and for an alternative writ dismissing the indictment against petitioner in the United States District Court for the Southern District of New York, bearing Docket No. 73 Cr. 514. The grounds upon which this petition is filed are the constitutional privilege of petitioner guaranteed by the Fifth Amendment to the Con-

stitution of the United States, not to be subject for the same offense to be twice put in jeopardy of life or limb, and the rules of law against double jeopardy, collateral estoppel and res judicata, or by whatever other name or term the foregoing Fifth Amendment prohibition shall apply.

3. Heretofore and on or about May 31, 1973, an indictment was filed against petitioner in the United States District Court for the Southern District of New York, bearing Docket No. 73 Cr. 514, alleging *inter alia,* seven counts of perjury, in violation of Title 18, United States Code, §1623. Annexed hereto as Exhibit A is a photocopy of said indictment.

4. In substance, said indictment alleged that petitioner committed perjury on or about December 14, 1971, when testifying in his own defense in a trial of an indictment bearing Docket No. 70 Cr. 967, in the United States District Court for the Southern District of New York, known as *United States* v. *Aloi, et al.,* which alleged violations of the securities laws of the United States, the mail fraud statute and conspiracy to violate the securities and mail fraud statutes. Annexed hereto as Exhibit B is a photocopy of said indictment.

5. The facts are that on or about December 14, 1971, petitioner, as a defendant, testified in his own defense in the aforesaid trial, conducted before Honorable Morris E. Lasker, United States District Judge, and a jury, and in substance petitioner denied the allegations of said indictment and denied the testimony of two certain witnesses, co-defendant Murray Taylor and co-conspirator John Kelsey, to the effect that petition attended a certain meeting at Gatsby's Restaurant on East 41st Street,

New York City, in late October or early November, 1969; that petitioner knew co-defendants Michael Hellerman, Murray Taylor, Vincent Gugliaro, Philip Bonadonna, and co-conspirator John Kelsey, before their indictment in said case; and that petitioner met and received a bottle of liquor from co-defendant Michael Hellerman, in the presence of co-conspirator John Kelsey, at the Americana Hotel in New York City, in November, 1969. In his testimony, petitioner specifically denied the testimony of these witnesses. The jury acquitted petitioner of the charges in said indictment by its verdict returned on or about December 23, 1971. For the purposes of this petition, petitioner respectfully incorporates herein, by reference, the indictment and all proceedings, including the transcript of the trial and all exhibits received in evidence at said trial, conducted as aforesaid before Judge Lasker and the jury during October, November and December, 1971.

6. The respondents in this proceeding are respectively Honorable Arnold Bauman, United States District Judge for the Southern District of New York, the judge before whom the indictment in Docket No. 73 Cr. 514 is assigned for all purposes, including the trial; Paul J. Curran, Esquire, the United States Attorney for the Southern District of New York, the attorney for the government in this prosecution; and the United States of America, the sovereignity and body politic on whose behalf this prosecution is being conducted.

7. In accordance with the holding and decision of the Supreme Court of the United States in the case of *Harris* v. *Washington,* 404 U. S. 55 (1971), it is appropriate for petitioner to proceed under the provisions of Title 28, United States Code, §1651, for the issuance by this Court

of a writ in the nature of a writ of prohibition, directed against the respondents, commanding them not to proceed with the prosecution of petitioner and for an alternative writ dismissing the indictment against petitioner in the United States District Court for the Southern District of New York, bearing Docket No. 73 Cr. 514.

8. The writ should issue for the following reasons: The prosecution of petitioner under Docket No. 73 Cr. 514, is in clear violation of petitioner's constitutional privilege against being subject to the same offense to be twice put in jeopardy of life or limb, and the rules of law against double jeopardy, collateral estoppel and res judicata, or by whatever other name or term the Fifth Amendment prohibition against such second or subsequent prosecution shall apply. There was necessarily litigated and necessarily determined in the prosecution of petitioner under Docket No. 70 Cr. 967, the precise issues of fact sought to be determined in the pending prosecution. The government sought to prove petitioner's membership and participation in the conspiracy alleged in the first indictment (70 Cr. 967) and of his having "aided and abetted" others in the violation of the substantive counts alleged against him in said indictment, principally by the testimony of the witnesses Murray Taylor and John Kelsey. The trial transcript of the testimony of these witnesses sets forth in precise detail their testimony. The remainder of the trial transcript sets forth and discloses the other evidence, if any, tending to establish petitioner's membership and participation in the alleged conspiracy and his participation in the substantive counts alleged against him. In defense of this testimony, other evidence and these charges, petitioner exercised his constitutional right to be a witness in his own defense. His testimony in

essence consisted of a denial of the allegations of the indictment and of the testimony of the aforesaid witnesses, as well as of any other evidence adduced at said trial against him. His testimony may be characterized as of the "exculpatory no" type. Thus the issues raised by the prosecution's evidence against petitioner and by petitioner's own testimony in the aforesaid first trial are the issues alleged in the pending perjury indictment. These issues of ultimate fact were necessarily litigated and necessarily determined in petitioner's favor by the jury in the first trial. There can be no relitigation of these issues through the guise of a perjury prosecution in the pending indictment. The constitution forbids it.

9. To require petitioner to undergo a new trial in the guise of a perjury prosecution will have the effect of relitigating issues of ultimate fact already once litigated and decided in favor of petitioner. Petitioner should not in this posture be required to undergo the expense, hardship, uncertainty and harassment of a second trial on the identical issues once previously litigated. In these days of crowded dockets, long delays in the administration of justice, as well as the need to conserve and wisely utilize judicial manpower, it is clearly improper, inappropriate and in violation of petitioner's aforementioned constitutional rights to require that he undergo this second prosecution.

10. The underlying facts of the pending perjury prosecution depend for their vitality upon the fact that at the first trial petitioner utilized and invoked his undoubted constitutional privilege to be a witness in his own defense at said trial. The use by the prosecutive agencies of the government of the tactic of prosecuting for perjury a

defendant previously acquitted of the underlying offenses, for having denied these charges, can have only a "chilling" effect on the exercise by a defendant of his constitutional right to be a witness in his own defense. Moreover, it secures an unfair advantage to the government in such circumstances, since it imposes an additional economic and financial burden on a defendant to undergo the cost, obligation and burden of a second defense of charges of which he was basically acquitted at the first trial, whereas the government, with its unlimited resources, money and power, has no such commensurate burden.

11. It is further petitioner's contention that under the holding of the Supreme Court in the case of *Ashe* v. *Swenson,* 397 U. S. 436 (1970), and other cases, the maintenance of the pending prosecution is impermissible and improper. In addition, in order that this petition be properly before this Court and thereafter properly considered, the following criteria established in *Ashe* v. *Swenson, supra,* at p. 444, be followed:

> "Where a previous judgment of acquittal was based upon a general verdict, as is usually the case, this approach requires a court to 'examine the record of a prior proceeding, taking into account the pleadings, evidence, charge and other relevant matter, and conclude whether a rational jury could have grounded its verdit upon an issue other than that which the defendant seeks to foreclose from consideration'. The inquiry 'must be set in a practical frame and viewed with an eye to all the circumstances of the proceedings.' *Sealfon* v. *United States,* 332 U. S. 575, 579. Any test more technically restrictive would, of course, simply amount

> to a rejection of the rule of collateral estoppel in criminal proceedings, at least in every case where the first judgment was based upon a general verdict of acquittal."

Thus, the burden imposed upon this Court in this proceeding is to make the foregoing detailed examination of the complete record and proceedings of the first trial to determine if the second trial, i. e. of the pending indictment, should be allowed.

12. It is respectfully requested in connection with the submission of this petition to this Court, that the respondents Paul J. Curran, Esquire and the United States of America, be ordered and directed to file with this Court a complete copy of the entire record of the first trial, including the complete trial transcript, exhibits, docket entries and all other proceedings of the trial of Docket No. 70 Cr. 967, held during October, November and December, 1971. Petitioner does not have any part of such record and exhibits, except a small portion of the trial transcript. This petition cannot properly be considered and determined by this Court without having before it such complete record. The aforesaid respondents have such complete record in their possession, as they have heretofore acknowledged.

13. Petitioner respectfully prays that a temporary injunction and restraining order be issued by this Court directed to the respondents temporarily enjoining and restraining the further prosecution and the trial of the indictment in the United States District Court for the Southern District of New York, bearing Docket No. 73 Cr. 514, against petitioner, pending the hearing and determination of this petition.

14. There has been no previous petition or application for a writ in the nature of a writ of prohibition or an alternative writ dismissing the aforesaid indictment sought by petitioner for the relief requested herein from this or any other court.

WHEREFORE, it is respectfully prayed that a writ in the nature of a writ of prohibition issue directed to the respondents, ordering and directing them not to proceed further with the prosecution and trial of petitioner of the indictment bearing Docket No. 73 Cr. 514, presently pending in the United States District Court for the Southern District of New York; and that an alternative writ issue dismissing said indictment, and that petitioner have such other and further relief as to the Court may seem just and proper.

Dated: New York, New York
July 26, 1973

Carmine Tramunti
Petitioner

FRIEDMANN, FISCHMAN & CHIKOFSKY
Attorneys for Petitioner

By: MURRAY J. CHIKOFSKY
Murray J. Chikofsky
A Member of the Firm
3 West 57 Street
New York, New York 10019

(Verified by Carmine Tramunti on July 26, 1973)

Exhibit A, Indictment Annexed to Petition

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Indictment 73 Cr. 514

UNITED STATES OF AMERICA

-v-

CARMINE TRAMUNTI,

Defendant.

The Grand Jury charges:

1. On or about the 14th day of December, 1971, in the Southern District of New York, Carmine Tramunti, the defendant, having duly taken an oath that he would testify truly before a competent tribunal, to wit, the United States District Court for the Southern District of New York, in a case in which a law of the United States authorizes an oath to be administered, did unlawfully, wilfully and knowingly, and contrary to said oath, make false material declaration which he knew to be false.

2. At the time and place aforesaid, said Court was conducting the trial of a criminal case entitled *United State of America* v. *Carmine Tramunti, Michael Hellerman, Murray Taylor, Philip Banodonna, Vincent Gugliaro, et al.*, Indictment No. 70 Cr. 967, in which indictment Carmine Tramunti, the defendant herein, was charged with violations of the federal securities laws, the mail fraud statute and the conspiracy statute, under Title 15, United States Code, Section 78j(b) and Title 18, United States Code, Sections 1341 and 371.

3. It was material to said trial to ascertain whether the defendant Carmine Tramunti knew of, or had ever met or had ever talked with Michael Hellerman, and what was said in any such meeting or conversation and by them.

4. At the time and place aforesaid, Carmine Tramunti, the defendant, appearing as a witness in his own behalf before said Court, testified falsely under oath before said Court with respect to the aforesaid material matter as follows:

Q. Do you know the co-defendant Michael Hellerman? A. No, sir.

Q. Have you ever met Mr. Hellerman? A. No, sir, never met him.

* * *

Q. Now, is it your testimony that you don't know Michael Hellerman? A. Yes, sir.

Q. You have never seen Michael Hellerman? A. I have never seen Michael Hellerman.

Q. Have you ever talked to Michael Hellerman? A. No, sir, never talked to him.

Q. Did you talk to him last Wednesday? A. Where?

Q. Did you talk to him last Wednesday? A. No, sir.

Q. Did you talk to him at any time ever? A. No, sir, never spoke to Mike Hellerman.

Q. Prior to the indictment in this case did you know who Mike Hellerman was? A. No, sir, I don't know him.

5. The aforesaid testimony of the defendant Carmine Tramunti as he then and there well knew, was untrue in

that the defendant Carmine Tramunti knew who Michael Hellerman was and had met and talked with Michael Hellerman on more than one occasion.

(Title 18, United States Code, Section 1623).

COUNT TWO

The Grand Jury further charges:

1. On or about the 14th day of December, 1971, in the Southern District of New York, Carmine Tramunti, the defendant, having duly taken an oath that he would testify truly before a competent tribunal, to wit, the United States District Court for the Southern District of New York, in a case in which a law of the United States authorizes an oath to be administered, did unlawfully, wilfully and knowingly, and contrary to said oath, make false material declarations which he knew to be false.

2. At the time and place aforesaid, said Court was conducting the trial of a criminal case entitled *United States of America* v. *Carmine Tramunti, Michael Hellerman, Murray Taylor, Philip Bonodonna, Vincent Gugliero, et al.*, Indictment No. 70 Cr. 967, in which indictment Carmine Tramunti, the defendant herein, was charged with violations of the federal securities laws, the mail fraud statute and the conspiracy statute, under Title 15, United States Code, Section 78j(b) and Title 18, United States Code, Sections 1341 and 371.

3. It was material to said trial to ascertain whether the defendant Carmine Tramunti knew, had ever met or had ever talked with John M. Kelsey, what was said in any such meeting or conversation and by whom.

Exhibit A, Indictment Annexed to Petition

4. At the time and place aforesaid, Carmine Tramunti, the defendant, appearing as a witness in his own behalf before said Court, testified falsely under oath before said Court, with respect to the aforesaid material matter as follows:

Q. Do you know the co-conspirator John M. Kelsey? A. No, sir.

Q. Did you ever meet Mr. Kelsey? A. Never met him either.

* * *

5. The aforesaid testimony of the defendant Carmine Tramunti, as he then and there well knew, was untrue, in that the defendant Carmine Tramunti knew John Kelsey and had met and talked with John Kelsey on more than one occasion.

(Title 18 United States Code, Section 1623).

COUNT THREE

The Grand Jury further charges:

1. On or about the 14th day of December, 1971, in the Southern District of New York, Carmine Tramunti, the defendant, having duly taken an oath that he would testify truly before a competent tribunal, to wit, the United States District Court for the Southern District of New York, in a case in which a law of the United States authorizes an oath to be administered, did unlawfully, wilfully and knowingly, and contrary to said oath, make false material declarations which he knew to be false.

2. At the time and place aforesaid, said Court was conducting the trial of a criminal case entitled *United States of America* v. *Carmine Tramunti, Michael Heller-*

man, Murray Taylor, Philip Bonodonna, Vincent Gugliaro, et al., Indictment No. 70 Cr. 967, in which indictment Carmine Tramunti, the defendant herein, was charged with violations of the federal securities laws, the mail fraud statute and the conspiracy statute, under Title 15, United States Code, Section 78j(b) and Title 18, United States Code, Sections 1341 and 371.

3. It was material to said trial to ascertain whether the defendant Carmine Tramunti knew, had ever met, or had ever talked with Murray Taylor, what was said in any such meeting or conversation and by whom.

4. At the time and place aforesaid, Carmine Tramunti, the defendant, appearing as a witness in his own behalf before said Court, testified falsely under oath before said Court, with respect to the aforesaid material matter as follows:

Q. Do you know the co-defendant Murray Taylor? A. No, sir.

Q. Ever meet Mr. Taylor? A. Never met him either.

* * *

Q. You testified, I believe that you don't know Murray Taylor, is that right? A. The honest truth, I don't know Murray Taylor.

Q. You never met Murray Taylor? A. I never met him, never.

Q. And you had never seen him before the indictment in this case? A. That's right.

* * *

Q. Did you see Taylor in Gatsby's? A. No, sir.

5. The aforesaid testimony of the defendant Carmine Tramunti, as he then and there well knew, was untrue in that the defendant Carmine Tramunti knew Murray Taylor and had met Murray Taylor on at least one occasion in Gastby's restaurant on East 41st Street in New York City.

(Title 18, United States Code, Section 1623).

COUNT FOUR

The Grand Jury further charges:

1. On or about the 14th day of December, 1971, in the Southern District of New York, Carmine Tramunti, the defendant, having duly taken an oath that he would testify truly before a competent tribunal, to wit, the United States District Court for the Southern District of New York in a case in which a law of the United States authorizes an oath to be administered, did unlawfully, wilfully and knowingly, and contrary to said oath, make false material declarations which he knew to be false.

2. At the time and place aforesaid, said Court was conducting the trial of a criminal case entitled *United States of America* v. *Carmine Tramunti, Michael Hellerman, Murray Taylor, Philip Bonodonna, Vincent Gugliaro, et al.,* Indictment No. 70 Cr. 967, in which indictment Carmine Tramunti, the defendant herein, was charged with violations of the federal securities laws, the mail fraud statute and the conspiracy statute, under Title 15, United States Code, Section 78j(b) and Title 18, United States Code, Sections 1341 and 371.

3. It was material to said trial to ascertain whether the defendant Carmine Tramunti knew, had ever met, or had

ever talked with Vincent Gugliaro, what was said in any such meeting or conversation and by whom.

4. At the time and place aforesaid, Carmine Tramunti, the defendant, appearing as a witness in his own behalf before said Court, testified falsely under oath before said Court, with respect to the aforesaid material as follows:

> Q. Now, do you know the defendant Vincent Gugliaro? A. No, sir.
>
> Q. When for the first time do you recall having seen him? A. Who, Gugliaro?
>
> Q. Yes. A. In this courtroom.

5. The aforesaid testimony of the defendant Carmine Tramunti, as he then and there well knew, was untrue in that the defendant Carmine Tramunti knew and had met Vincent Gugliaro on at least one occasion in Gatsby's restaurant on East 41st Street in New York City.

(Title 18, United States Code, Section 1623).

COUNT FIVE

The Grand Jury further charges:

1. On or about the 14th day of December, 1971, in the Southern District of New York, Carmine Tramunti, the defendant, having duly taken an oath that he would testify truly before a competent tribunal, to wit, the United States District Court for the Southern District of New York, in a case in which a law of the United States authorized an oath to be administered, did unlawfully, wilfully and knowingly, and contrary to said oath, make false material declarations which he knew to be false.

Exhibit A, Indictment Annexed to Petition

2. At the time and place aforesaid, said Court was conducting the trial of a criminal case entitled *United States of America* v. *Carmine Tramunti, Michael Hellerman, Murray Taylor, Philip Bonodonna, Vincent Gugliaro, et al.,* Indictment No. 70 Cr. 967, in which indictment Carmine Tramunti, the defendant herein, was charged with violations of the federal securities laws, the mail fraud statute and the conspiracy statute, under Title 15, United States Code, Section 78j(b) and Title 18, United States Code, Sections 1341 and 371.

3. It was material to said trial to ascertain whether the defendant Carmine Tramunti knew, had ever met, or had ever talked with Philip Bonadonna, what was said in any such meeting or conversation and by whom.

4. At the time and place aforesaid, Carmine Tramunti, the defendant, appearing as a witness in his own behalf before said Court, testified falsely under oath before said Court with respect to the aforesaid material matter as follows:

Q. Do you know the defendant Philip Bonadonna?
A. No, sir.

* * *

Q. Is it your testimony that you never met Phil Bonadonna? A. Yes, sir, never met him.

Q. You never saw that man? A. Never met him, just in this courtroom.

5. The aforesaid testimony of the defendant Carmine Tramunti, as he then and there well knew, was untrue in that the defendant Carmine Tramunti knew and had met

Exhibit A, Indictment Annexed to Petition

Philip Bonadonna on at least one occasion in Gatsby's restaurant on East 41st Street in New York City.

(Title 18, United States Code, Section 1623).

COUNT SIX

The Grand Jury further charges:

1. On or about the 14th day of December, 1971, in the Southern District of New York, Carmine Tramunti, the defendant, having duly taken an oath that he would testify truly before a competent tribunal, to wit, the United States District Court for the Southern District of New York, in a case in which a law of the United States authorized an oath to be administered, did unlawfully, wilfully and knowingly, and contrary to said oath, make false material declarations which he knew to be false.

2. At the time and place aforesaid, said Court was conducting the trial of a criminal case entitled *United States of America* v. *Carmine Tramunti, Michael Hellerman, Murray Taylor, Philip Bonadonna, Vincent Gugliaro, et al.*, Indictment No. 70 Cr. 967, in which indictment Carmine Tramunti, the defendant herein, was charged with violations of the federal securities laws, the mail fraud statute and the conspiracy statute, under Title 15, United States Code, Section 78j(b) and Title 18, United States Code, Sections 1341 and 371.

3. It was material to said trial to ascertain whether the defendant Carmine Tramunti attended a meeting in late October or early November 1969 at Gatsby's restaurant on East 41st Street in New York City at which there was a discussion of a stock manipulation scheme involving Imperial Investment Corporation stock.

Exhibit A, Indictment Annexed to Petition

4. At the time and place aforesaid, Carmine Tramunti, the defendant, appearing as a witness in his own behalf before said Court, testified falsely under oath before said Court with respect to the aforesaid material matter as follows:

Q. Do you know anything about Imperial Investment Corporation? A. No, sir.

* * *

Q. Did Taylor explain the Imperial deal to you? A. Me?

Q. Yes. A. I don't know nothing about the deal. I don't even know him. How could he explain it to me?

Q. There is testimony in this case that some time around the end of October or the first two weeks in November 1969 that you attended a luncheon meeting at the new Gatsby's Restaurant on East 41st Street at which six other persons attended. Did you ever attend any such luncheon meeting with six other persons at that time, at that restaurant? A. No, sir, and he's a liar.

* * *

Q. Apart from the time you and I went to Gatsby's and met John Dioguardi, have you ever been there in the fall of 1969 for a luncheon with anyone else? A. No, sir.

* * *

Q. Mr. Taylor said that you attended a luncheon with himself—just a minute. I have the names written out. I don't want to make a mistake—with himself, John Dioguardi, Michael Hellerman, you, John Kelsey, Vincent Gugliaro and Philly Black some time in the first ten days of November, 1969,

after Mr. Taylor's return from his second trip to Montreal, which was on the 3rd of November, 1969.

Did you attend such luncheon with Mr. Taylor? A. No, sir.

Q. Mr. Kelsey has testified that he attended a luncheon with you, John Dioguardi, Vincent Aloi, Murray Taylor, a man that he said was Little Vinnie and another man whose name he did not know but he pointed to Mr. Bonodonna some time while Mr. Hellerman was on an out-of-town trip shortly after Mr. Taylor made his trip to Canada on the first Sunday or Monday of November 1969.

Did you attend any such meeting that Mr. Kelsey mentioned? A. I never attended no such meeting.

Q. Mr. Kelsey said at this luncheon you had very little to say, you merely answered one or two questions and nodded your head.

Did you do any such thing at any such luncheon? A. No, sir. I never was at that meeting.

5. The aforesaid testimony of the defendant Carmine Tramunti, as he then and there well knew, was untrue in that the defendant Carmine Tramunti attended a meeting in late October or early November 1969 at Gatsby's restaurant on East 41st Street in New York City at which there was a discussion of a stock manipulation scheme involving Imperial Investment Corporation stock.

(Title 18, United States Code, Section 1623).

COUNT SEVEN

The Grand Jury further charges:

1. On or about the 14th day of December, 1971, in the Southern District of New York, Carmine Tramunti, the

defendant, having duly taken an oath that he would testify truly before a competent tribunal, to wit, the United States District Court for the Southern District of New York, in a case in which a law of the United States authorizes an oath to be administered, did unlawfully, wilfully and knowingly, and contrary to said oath, make false material declarations which he knew to be false.

2. At the time and place aforesaid, said Court was conducting the trial of a criminal case entitled *United States of America* v. *Carmine Tramunti, Michael Hellerman, Murray Taylor, Philip Bonodonna, Vincent Gugliaro, et al.*, Indictment No. 70 Cr. 967, in which indictment Carmine Tramunti, the defendant herein, was charged with violations of the federal securities laws, the mail fraud statute and the conspiracy statute, under Title 15, United States Code, Section 78j(b) and Title 18, United States Code, Sections 1341 and 371.

3. It was material to said trial to ascertain whether the defendant Carmine Tramunti met and spoke with Michael Hellerman or Jack Kelsey at the Americana Hotel in New York City in November 1969, what was said at this meeting and by whom.

4. At the time and place aforesaid, Carmine Tramunti, the defendant, appearing as a witness in his own behalf before said Court, testified falsely under oath before said Court, with respect to the aforesaid material matter as follows:

> Q. Did Hellerman send you a bottle of liquor when you were watching Englebert Humperdink? A. Not to my knowledge, he never sent me no liquor.

Exhibit A, Indictment Annexed to Petition

Q. Did you go to the Americana, to a show where Englebert Humperdink was playing? A. Maybe yes and maybe no.

* * *

Q. Did you ever go to the Americana to see a show? A. Yes. I went to the Americana a lot of times.

Q. And have you ever seen Engelbert Humperdink at the Americana? A. Yes, I saw him twice.

* * *

Q. And when you were there did anybody send a bottle of liquor over to your table? A. I don't remember if anybody sent me liquor.

Q. And did you then come over to a table where Hellerman and Kelsey were sitting? A. Me?

Q. You. A. Never.

Q. Did you say hello to Kelsey? A. I don't know him, so how can I say hello?

Q. Did you say hello to Hellerman? A. How can I say hello? I don't know him.

Q. Did you thank Hellerman for sending the liquor? A. How could I thank him?

Q. Did you ask Kelsey how things were? A. I don't know Kelsey.

Q. Have you ever met Jack Kelsey, Mr. Tramunti? A. Never in my life. Never in my life. . . .

5. The aforesaid testimony of the defendant Carmine Tramunti, as he then and there knew, was untrue in that the defendant Carmine Tramunti did meet and talk with Michael Hellerman and Jack Kelsey at the Americana Hotel in November 1969.

(Title 18, United States Code, Section 1623).

WHITNEY NORTH SEYMOUR, JR.
United States Attorney

Foreman

Exhibit B, Indictment Annexed to Petition

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

Indictment 70 Cr. 967

UNITED STATES OF AMERICA

-v-

JOHN DIOGUARDI, CARMINE TRAMUNTI, VINCENT ALOI, VINCENT GUGLIARO, VINCENT LOMBARDO, PASQUALE FUSCO, JOHN SAVINO, PHILIP BONODONO, JAMES BURKE, MICHAEL HELLERMAN, MURRAY TAYLOR, ROBERT FRANK, FRED GOODMAN, RONALD ALPERT, BERNARD WEISS and ERWIN LAYNE,

Defendants.

The Grand Jury charges:

1. From on or about the 1st day of December, 1968 and continuously thereafter up to and including the date of the filing of this indictment, in the Southern District of New York and elsewhere, John Dioguardi, Carmine Tramunti, Vincent Aloi, Vincent Gugliaro, Vincent Lombardo, Pasquale Fusco, John Savino, Philip Bondono, James Burke, Michael Hellerman, Murray Taylor, Robert Frank, Fred Goodman, Ronald Alpert, Bernard Weiss and Erwin Layne, the defendants herein and Gerald Devins, Sidney Stein, Steven Schoengold, John Kelsey, Ira Schultz, Stanleigh Bader, Joseph Bald, Rene De Marco, Steve Murray, and Anthony Soldano named herein as co-conspirators but not as defendants unlawfully, wilfully and knowingly did combine, conspire, confederate and

agree together and with each other and with other persons to the Grand Jury known and unknown to commit certain offenses against the United States, to wit violations of Sections 77e, 77q(a), 77x, 78j, 78ff of Title 15 and Sections 1341, 1343 and 1952 of Title 18.

2. It was part of said conspiracy that said defendants unlawfully, wilfully and knowingly in the offer and sale of securities, to wit, common stock of Imperial Investment Corporation (hereinafter Imperial), by the use of means and instruments of transportation and communications in interstate commerce and by use of the mails, would directly and indirectly (a) employ devices, schemes and artifices to defraud; (b) obtain money and property by means of untrue statements of material facts and omissions to state material facts necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading; and (c) engage in transactions, practices and courses of business which operated and would operate as a fraud and deceit upon the purchasers of the common stock of Imperial and upon any and all persons to whom the said defendants and co-conspirators, directly and indirectly, would attempt to sell the aforementioned securities.

3. It was further a part of said conspiracy that said defendants and co-conspirators, having devised and intending to devise a scheme and artifice to defraud, and for obtaining money and property by means of false and fraudulent pretenses, respresentations and promises, unlawfully, wilfully and knowingly, and for the purpose of executing said scheme and artifice and attempting so to do, would place and cause to be placed in post offices and authorized depositories for mail matter, and would

cause to be delivered by mail according to the direction thereon, certain matter to be sent and delivered by the Post Office Department.

4. It was further a part of said conspiracy that said defendants and co-conspirators, having devised and intending to devise a scheme and artifice to defraud, and for obtaining money and property by means of false and fraudulent pretenses, representations and promises, unlawfully, wilfully and knowingly, would transmit and cause to be transmitted by means of wire communication in interstate and foreign commerce, writings, signs, signals and sounds for the purpose of executing said scheme and artifice.

5. It was further a part of said conspiracy that said defendants and co-conspirators unlawfully, wilfully and knowingly would, directly and indirectly, make use of means and instruments of transportation and communication in interstate and foreign commerce and of the mails to sell securities, to wit, common stock of Imperial through the use and medium of a prospectus and otherwise, no registration statement as to said securities being in effect with the Securities and Exchange Commission.

6. It was further a part of said conspiracy that said defendants and co-conspirators, would travel and cause travel in interstate commerce and would use and cause to be used facilities in interstate commerce with intent to promote, manage, establish, carry on and facilitate the promotion, management, establishment and carrying on of an unlawful activity, to wit, extortion in violation of the laws of the States of Florida and New York.

7. It was further a part of said conspiracy that the defendants and their co-conspirators in connection with the purchase and sale of securities, to wit, common stock of Imperial, would directly and indirectly, use means and instrumentalities of interstate commerce and the mails to use and employ manipulative and deceptive devices and contrivances in contravention of Rule 10b-5 [17 CFR Section 240.10b-5] of the rules and regulations of the United States Securities and Exchange Commission.

8. Among the means by which the defendants and co-conspirators would and did carry out the said conspiracy were the following:

(a) Co-conspirator Gerald Devins would and did purchase a controlling interest in Fallon Smith Corporation, the name of which was subsequently changed to Imperial Investment Corporation.

(b) Defendants Michael Hellerman and Robert Frank would and did arrange for defendant Michael Hellerman and co-conspirator Gerald Devins to purchase 154,600 shares of Fallon Smith Corporation.

(c) Defendants Michael Hellerman, Robert Frank and co-conspirator Gerald Devins would and did agree that defendant Michael Hellerman would sell the aforementioned stock and split the profits with co-conspirator Gerald Devins.

(d) Defendants Michael Hellerman and John Savino would and did take control of Imperial by having defendants James Burke, Vincent Lombardo and Pasquale Fusco threaten and beat co-conspirator Gerald Devins and forcibly remove from the possession of Gerald Devins all blank stock certificates of Imperial.

(e) Defendant Michael Hellerman would and did take control of an additional 21,500 shares of Imperial by causing defendants James Burke, Vincent Lombardo and Pasquale Fusco to threaten the true owners thereof and thereby cause them to give custody and control of said stock to defendant Michael Hellerman.

(f) Defendant Michael Hellerman would and did cause various brokerage firms to enter the "pink sheets" of the National Daily Quotation Service to establish and maintain an artificial price for and to convey the false and misleading impression that there was an active market in Imperial stock for the purpose of inducing the purchase of Imperial stock by others.

(g) Defendants Michael Hellerman, Fred Goodman and Murray Taylor would and did agree that Taylor would purchase Imperial and that Hellerman would sell Imperial through the over the counter securities market.

(h) Defendant Murray Taylor and co-conspirator Joseph Bald would and did open up accounts at various brokerage houses and purchase and order substantial quantities of Imperial stock to establish and maintain an artificial price for and to convey the false and misleading impression that there was an active market in Imperial stock.

(i) Defendants Michael Hellerman, Murray Taylor, John Dioguardi and Fred Goodman would and did agree to split all profits derived as a result of the sales by defendant Michael Hellerman of Imperial stock at the artificially and manipulatively maintained price.

(j) Defendant Michael Hellerman caused co-conspirator Ira Schultz, a registered representative at Bruns, Nordeman & Co. to recommend Imperial stock to his customers

for the purpose of creating and maintaining an artificially high price for the stock.

(k) Defendants Michael Hellerman, Fred Goodman, Murray Taylor, John Dioguardi, Carmine Tramunti, Philip Bonodono, Ronald Alpert, Bernard Weiss, Erwin Layne and Vincent Gugliaro would and did agree to create the false and misleading impression that there was an active market in Imperial stock for the purpose of causing the price of said stock to rise.

(l) Defendants Michael Hellerman and Murray Taylor would and did arrange for defendant Murray Taylor to secure loans so that he could pay for the Imperial stock purchased by defendant Murray Taylor and co-conspirator Joseph Bald.

(m) Defendants Murray Taylor, Ronald Alpert and Bernard Weiss would and did open up accounts at Paul F. Newton & Co., a brokerage firm in Houston, Texas and order and purchase Imperial stock to create the false and misleading impression that there was an active market in Imperial stock for the purpose of causing the price of said stock to rise and be maintained at artificially high prices.

(n) Defendant Michael Hellerman co-conspirators John Kelsey and Steven Schoengold would and did control the brokerage firm of J. M. Kelsey & Co.

(o) Defendants Michael Hellerman and Murray Taylor and co-conspirators John Kelsey and Steven Schoengold would and did open up accounts in nominee names for defendants Murray Taylor and Michael Hellerman and sell Imperial stock in said accounts at the same time defendants Murray Taylor, Ronald Alpert and Bernard Weiss were purchasing it in Texas.

(p) Defendant Fred Goodman would and did purchase and cause purchases to be made of Imperial to create the false and misleading impression that there was an active market in Imperial stock and for the purpose of causing the price of said stock to rise.

(q) Defendants Michael Hellerman and Robert Frank would and did cause a portion of the proceeds of the sale of Imperial stock to be paid to co-conspirator Gerald Devins.

(r) Defendants Michael Hellerman, Murray Taylor, John Dioguardi, Ronald Alpert, Bernard Weiss, Erwin Layne, Philip Bonodono and Vincent Gugliaro would and did split up the profits from the aforementioned sales of Imperial.

(s) Defendants John Dioguardi, Carmine Tramunti, Vincent Aloi, Michael Hellerman, Murray Taylor, Fred Goodman, Robert Frank, Ronald Alpert, Bernard Weiss, Erwin Layne, Philip Bonodono and Vincent Gugliaro, would and did directly and indirectly in the offer and sale of Imperial, unlawfully, wilfully and knowingly make and cause to be made to purchasers of Imperial false, fraudulent and misleading written and oral promises, representations and statements and knowingly would and did conceal and omit to disclose to the purchaser of Imperial material facts necessary to be stated in order to make the statements made to said persons, in the light of the circumstances under which they were made, not misleading.

(t) Defendants John Dioguardi, Carmine Tramunti, Vincent Aloi and Vincent Gugliaro would and did call and hold "sit downs" to organize the distribution of Imperial, to resolve disputes between the defendants and co-conspirators and to decide upon the distribution of the proceeds.

Exhibit B, Indictment Annexed to Petition

OVERT ACTS

In furtherance of said conspiracy and to effect the objects thereof, the defendants did commit the following overt acts in the Southern District of New York:

1. On or about June 17, 1969, defendant Michael Hellerman was at 6 East 43rd Street, New York, New York.

2. On or about August 22, 1969, defendants Michael Hellerman, James Burke and Pasquale Fusco were at 209 W. 30th St., New York, New York.

3. In or about October, 1969, defendant Fred Goodman was at 1410 Broadway, New York, New York.

4. On or about November 3, 1969, defendant Murray Taylor was at 111 Broadway, New York, New York.

5. In or about November, 1969 defendant John Dioguardi was at 20 East 41st Street, New York, New York.

6. In or about November, 1969 defendants Carmine Tramunti and Vincent Gugliaro were at 20 East 41st Street, New York, New York.

7. On or about December 2, 1969 defendant Ronald Alpert was at 103 Park Avenue, New York, New York.

8. On or about December 2, 1969 defendant Bernard Weiss was at 103 Park Avenue, New York, New York.

9. In or about February, 1970 defendant Vincent Aloi was at 20 East 41st Street, New York, New York.

(Title 18, United States Code, Section 371)

Exhibit B, Indictment Annexed to Petition

COUNTS TWO THROUGH ELEVEN

The Grand Jury further charges:

1. From on or about the 1st day of December, 1968 up to and including the date of the filing of this indictment in the Southern District of New York, the defendants John Dioguardi, Carmine Tramunti, Vincent Aloi, Michael Hellerman, Vincent Gugliaro, Murray Taylor, Robert Frank, Fred Goodman, Ronald Alpert, Bernard Weiss, Erwin Layne, and Philip Bonodono, unlawfully, wilfully and knowingly in the offer and sale of securities, to wit common stock of Imperial, by the use of means and instruments of transportation and communications in interstate commerce and by use of the mail, (a) did employ devices, schemes and artifices to defraud; (b) did obtain money and property by means of untrue statements of material facts and omissions to state material facts necessary in order to make the statement made in the light of the circumstances under which they were made, not misleading; and, (c) did engage in transactions, practices and courses of business which would operate and did operate as a fraud and deceit upon purchasers of said securities and other persons whom the said defendants, directly and indirectly, attempted to induce to purchase said securities.

2. The allegations contained in paragraph 8 of Count One of this indictment are repeated and realleged as though fully set forth herein as constituting and describing the means by which the defendants committed the offense charged in paragraph 1 of these counts.

3. On or about the dates hereinafter set forth in Counts two through eleven in the Southern District of New York,

the defendants, John Dioguardi, Carmine Tramunti, Vincent Aloi, Vincent Gugliaro, Michael Hellerman, Murray Taylor, Robert Frank, Fred Goodman, Ronald Alpert, Bernard Weiss, Erwin Layne, and Philip Bonodono unlawfully, wilfully and knowingly did cause to be delivered by mail, according to the direction thereon, to the persons hereinafter set forth, the matter hereinafter set forth:

Count	*Date*	*Addressee*	*Matter*
2	11/18/69	Jack Rosenberg c/o M. Taylor 103 Park Avenue New York, New York	A confirmation for sale of 1,000 shares of Imperial stock.
3	12/16/69	Jack Rosenberg c/o M. Taylor 103 Park Avenue New York, New York	Confirmations for sale of 2,000 shares of Imperial stock.
4	12/23/69	William Scully c/o M. Taylor 103 Park Avenue New York, New York	A confirmation for sale of 2,000 shares of Imperial stock.
5	12/24/69	Jack Rosenberg c/o M. Taylor 103 Park Avenue New York, New York	Confirmations for sale of 4,000 shares of Imperial stock.
6	12/24/69	Sam Reiss c/o M. Taylor 103 Park Avenue New York, New York	A confirmation for sale of 1,000 shares of Imperial stock.
7	12/24/69	Victor Olbert c/o M. Taylor 103 Park Avenue New York, New York	A confirmation for sale of 1,000 shares of Imperial stock.
8	12/24/69	Abraham Mandel c/o M. Taylor 103 Park Avenue New York, New York	A confirmation for sale of 1,000 shares of Imperial stock.

Exhibit B, Indictment Annexed to Petition

Count	*Date*	*Addressee*	*Matter*
9	12/26/69	Jack Rosenberg c/o M. Taylor 103 Park Avenue New York, New York	Confirmations for sale of 6,700 shares of Imperial stock.
10	1/19/70	Morris Stein c/o M. Taylor 103 Park Avenue New York, New York	A confirmation for sale of 2,000 shares of Imperial stock.
11	1/19/70	Jack Rosenberg c/o M. Taylor 103 Park Avenue New York, New York	Confirmations for sale of 6,000 shares of Imperial stock.

(Title 15, United States Code, Sections 77q(a) and 77x; Title 18, United States Code, Section 2)

COUNTS TWELVE THROUGH TWENTY-SEVEN

1. From on or about the 1st day of December, 1968 up to and including the date of the filing of this indictment in the Southern District of New York, the defendants John Dioguardi, Carmine Tramunti, Vincent Aloi, Vincent Gugliaro, Michael Hellerman, Murray Taylor, Robert Frank, Fred Goodman, Ronald Alpert, Bernard Weiss, Erwin Layne and Philip Bonodono, unlawfully, wilfully and knowingly did, directly and indirectly, by use of means and instrumentalities of interstate commerce and the mails, use and employ in connection with the purchase and sale of securities to wit common stock of Imperial, manipulative, and deceptive devices and contrivances in contravention of Rule 10b-5 [17 CFR Section 240.10b-5] of the rules and regulations of the United States Securities and Exchange Commission.

2. The allegations contained in paragraph 8 of Count One of this indictment are repeated and realleged as

though fully set forth herein, as constituting and describing the means by which said defendants committed the offense charged in paragraph 1 of these counts.

3. On or about the dates hereinafter set forth in Counts twelve through twenty-seven, n the Southern District of New York, the defendants John Dioguardi, Carmine Tramunti, Vincent Aloi, Vincent Gugliaro, Michael Hellerman, Murray Taylor, Robert Frank, Fred Goodman, Ronald Alpert, Bernard Weiss, Erwin Layne, and Philip Bonodono unlawfully, wilfully and knowingly did use and cause to be used means and instrumentalities of interstate commerce and the mails pursuant to and in furtherance of the scheme alleged in paragraph 1 of these counts, by sending and causing to be sent to the persons and addresses hereinafter set forth the matter hereinafter set forth:

Count	*Date*	*Addressee*	*Matter*
12	12/ 2/69	Ronald Alpert 16 Cantebury Rd. Great Neck, N. Y.	Confirmations for 3,000 shares of Imperial stock.
13	12/ 4/69	Ronald Alpert 16 Cantebury Rd. Great Neck, N. Y.	Confirmations for 2,000 shares of Imperial stock.
14	12/15/69	Bernard Weiss 1175 E. 59th St. Brooklyn, N. Y.	Confirmations for 3,700 shares of Imperial stock.
15	12/16/69	Bernard Weiss 1175 E. 59th Street Brooklyn, N. Y.	Confirmation for 2,000 shares of Imperial stock.
16	12/18/69	Bernard Weiss 1175 E. 59th St. Brooklyn, N. Y.	Confirmation for 600 shares of Imperial stock.
17	12/18/69	Ronald Alpert 16 Cantebury Rd. Great Neck, N. Y.	Confirmations for 1,500 shares of Imperial stock.

Exhibit B, Indictment Annexed to Petition

Count	*Date*	*Addressee*	*Matter*
18	12/18/69	Steve Tobak 1024 Banner Ave. Brooklyn, N. Y.	Confirmations for 4,000 shares of Imperial stock.
19	12/19/69	Steve Tobak 1024 Banner Ave. Brooklyn, N. Y.	A confirmation for 2,000 shares of Imperial stock.
20	12/22/69	Bernard Weiss 1175 E. 59th St. Brooklyn, N. Y.	A confirmation for 1,000 shares of Imperial stock.
21	12/22/69	Stanley S. Lane 103 Park Avenue New York, New York	Confirmations for 1,300 shares of Imperial stock.
22	12/23/69	Steve Toback 1024 Banner Ave. Brooklyn, N. Y.	Confirmations for 2,000 shares of Imperial stock.
23	12/23/69	Bernard Weiss 1175 E. 59th Street Brooklyn, N. Y.	Confirmations for 2,000 shares of Imperial stock.
24	12/23/69	Stanley S. Lane 103 Park Avenue New York, New York	Confirmations for 2,000 shares of Imperial stock.
25	12/24/69	Murray H. Taylor 103 Park Avenue New York, New York	Confirmations for 10,000 shares of Imperial stock.
26	12/26/69	Stanley S. Lane 103 Park Avenue New York, New York	Confirmations for 1,000 shares of Imperial stock.
27	12/26/69	Murray H. Taylor 103 Park Avenue New York, N. Y. 10017	Confirmations for 10,000 shares of Imperial stock.

(Title 15, United States Code, Sections 78j(b) and 78ff; Title 18, United States Code, Section 2).

Exhibit B, Indictment Annexed to Petition

COUNTS TWENTY-EIGHT THROUGH THIRTY-TWO

The Grand Jury further charges:

On or about the dates hereinafter set forth in Counts twenty-eight through thirty-two, the defendants, John Dioguardi, Vincent Lombardo, Pasquale Fusco, James Burke, Michael Hellerman, and Robert Frank unlawfully, wilfully and knowingly, directly and indirectly, made use of the mails and caused the mails to be used to sell a security, to wit, common stock of Imperial, through the use and medium of a prospectus and otherwise, in that said defendants did use the mails and cause the mails to be used to send from Bruns, Nordeman & Co., 115 Broadway, New York, New York to Michael Hellerman, c/o Bill Weiss, c/o Jezer Slade & Weiss, 6 East 43rd St., New York, New York, confirmations covering sales of said security in the amounts hereinafter set forth, no registration statement as to said security being in effect with the Securities and Exchange Commission.

Count	*Date*	*Number of Shares*
28	6/10/69	2700
29	6/11/69	1400
30	6/12/69	2500
31	6/13/69	2400
32	6/18/69	1300

(Title 15, United States Code, Sections 77e, 77x;
Title 18, United States Code, Section 2)

COUNTS THIRTY-THREE THROUGH FORTY-NINE

The Grand Jury further charges:

On or about the dates hereinafter set forth in Counts thirty-three through forty-nine, the defendants, John

Exhibit B, Indictment Annexed to Petition

Dioguardi, Vincent Lombardo, Pasquale Fusco, James Burke, Michael Hellerman and Robert Frank unlawfully, wilfully and knowingly, directly and indirectly, made use of the mails and caused the mails to be used to sell a security, to wit, common stock of Imperial through the use and medium of a prospectus and otherwise in that said defendants did use the mails and caused the mails to be used to send from Coggeshall & Hicks, 1 Liberty Street, New York, New York, to Michael Hellerman, 50 Lenox Rd., Rockville Center, N. Y., confirmations covering sales of said security in the amounts hereinafter set forth, no registration statement as to said security being in effect with the Securities and Exchange Commission.

Count	*Date*	*Number of Shares*
33	9/ 2/69	1000
34	9/11/69	1000
35	9/15/69	1000
36	9/16/69	1000
37	10/ 7/69	4900
38	10/ 8/69	5300
39	10/10/69	2500
40	10/13/69	2200
41	10/15/69	500
42	10/16/69	1900
43	10/17/69	2200
44	10/20/69	1500
45	10/21/69	3200
46	10/22/69	3750
47	10/23/69	500
48	10/24/69	2500
49	11/11/69	1300

(Title 15, United States Code, Sections 77e, 77x; Title 18, United States Code, Section 2)

Exhibit B, Indictment Annexed to Petition

COUNTS FIFTY THROUGH FIFTY-ONE

The Grand Jury further charges:

On or about the dates hereinafter set forth in Counts fifty through fifty-one, the defendants, John Dioguardi, Vincent Lombardo, Pasquale Fusco, James Burke, Michael Hellerman, and Robert Frank unlawfully, wilfully and knowingly, directly and indirectly, made use of the mails and caused the mails to be used to sell a security, to wit, common stock of Imperial, through the use and medium of a prospectus and otherwise, in that said defendants did use the mail and cause the mails to be used to send from J. M. Kelsey & Co., 535 5th Avenue, New York, New York, to Michael Hellerman, 50 Lenox Road, Rockville Centre, New York, confirmations covering sales of said security in the amounts hereinafter set forth, no registration statement as to said security being in effect with the Securities and Exchange Commission.

Count	*Date*	*Number of Shares*
50	11/24/69	3000
51	11/26/69	2000

(Title 15, United States Code, Sections 77e, 77x; Title 18, United States Code, Section 2)

COUNTS FIFTY-TWO THROUGH FIFTY-FOUR

The Grand Jury further charges:

On or about the dates hereinafter set forth in Counts fifty-two through fifty-four, the defendants, John Dioguardi, Vincent Lombardo, Pasquale Fusco, James Burke, Michael Hellerman, and Robert Frank unlawfully, wilfully and knowingly, directly and indirectly, made use of the mails and caused the mails to be used to sell a security, to

wit, common stock of Imperial, through the use and medium of a prospectus and otherwise, in that said defendants did use the mails and cause the mails to be used to send from J. M. Kelsey & Co., 535 5th Avenue, New York, New York, to Jack Rosenberg, c/o M. Taylor, 103 Park Avenue, New York, New York, confirmations covering sales of said security in the amounts hereinafter set forth, no registration statement as to said security being in effect with the Securities and Exchange Commission.

Count	*Date*	*Number of Shares*
52	12/15/69	1500
53	12/16/69	1000
54	12/26/69	2000

(Title 15, United States Code, Sections 77e, 77x; Title 18, United States Code, Section 2)

COUNTS FIFTY-FIVE THROUGH FIFTY-SIX

The Grand Jury further charges:

On or about the dates hereinafter set forth in Counts fifty-five through fifty-six, the defendants, John Dioguardi, Vincent Lombardo, Pasquale Fusco, James Burke, Michael Hellerman and Robert Frank unlawfully, wilfully and knowingly, directly and indirectly, made use of the mails and caused the mails to be used to sell a security, to wit, common stock of Imperial, through the use and medium of a prospectus and otherwise, in that said defendants did use the mails and cause the mails to be used to send from J. M. Kelsey & Co., 535 5th Avenue, New York, New York, to Morris Stein, c/o M. Taylor, 103 Park Avenue, New York, New York, confirmations covering sales of said security in the amounts hereinafter set forth, no registration statement as to said security being in effect with the Securities and Exchange Commission.

Exhibit B, Indictment Annexed to Petition

Count	*Date*	*Number of Shares*
55	12/18/69	2000
56	12/22/69	3000

(Title 15, United States Code, Sections 77e, 77x; Title 18, United States Code, Section 2)

COUNTS FIFTY-SEVEN THROUGH SEVENTY-TWO

The Grand Jury further charges:

1. From on or about the dates hereinafter set forth in Counts fifty-seven through seventy-two, in the Southern District of New York, the defendants, John Dioguardi, Carmine Tramunti, Vincent Aloi, Vincent Gugliaro, Philip Bonodono, Michael Hellerman, Murray Taylor, Robert Frank, Fred Goodman, Ronald Alpert, Bernard Weiss, and Erwin Layne, unlawfully, wilfully and knowingly did devise and intend to devise a scheme and artifice to defraud banks, brokerage houses and purchasers of common stock of Imperial and to obtain money and property from said persons by means of false and fraudulent pretenses, representations and promises and for the purpose of executing said scheme and artifice to defraud and attempting so to do, did place and cause to be placed in post offices and authorized depositories for mail matter, and did cause to be delivered by mail according to the directions thereon certain matter to be sent and delivered by the Post Office Department.

2. The allegations contained in paragraph 8 of Count one of this indictment are repeated and realleged as though fully set forth herein as constituting and describing the means by which the defendants committed the offense

charged in paragraph 1 of Counts fifty-seven through seventy-two.

3. On or about the dates hereinafter set forth in Counts fifty-seven through seventy-two in the Southern District of New York, the defendants, John Dioguardi, Carmine Tramunti, Vincent Aloi, Vincent Gugliaro, Philip Bondono, Michael Hellerman, Murray Taylor, Robert Frank, Fred Goodman, Ronald Alpert, Bernard Weiss, and Erwin Layne unlawfully, wilfully and knowingly did cause to be delivered by mail, according to the direction thereon, to the persons hereinafter set forth, the matter hereinafter set forth:

Count	*Date*	*Addressee*	*Matter*
57	12/ 2/69	Ronald Alpert 16 Cantebury Rd. Great Neck, N. Y.	Confirmations for 3,000 shares of Imperial stock.
58	12/ 4/69	Ronald Alpert 16 Cantebury Rd. Great Neck, N. Y.	Confirmations for 2,000 shares of Imperial stock.
59	12/15/69	Bernard Weiss 1175 E. 59th St. Brooklyn, N. Y.	Confirmations for 3,700 shares of Imperial stock.
60	12/16/69	Bernard Weiss 1175 E. 59th St. Brooklyn, N. Y.	Confirmations for 2,000 shares of Imperial stock.
61	12/18/69	Bernard Weiss 1175 E. 59th St. Brooklyn, N. Y.	Confirmations for 600 shares of Imperial stock.
62	12/18/69	Ronald Alpert 16 Cantebury Rd. Great Neck, N. Y.	Confirmations for 1,500 shares of Imperial stock.
63	12/18/69	Steve Tobak 1024 Banner Ave. Brooklyn, N. Y.	Confirmations for 4,000 shares of Imperial stock.

Exhibit B, Indictment Annexed to Petition

Count	*Date*	*Addressee*	*Matter*
64	12/19/69	Steve Tobak 1024 Banner Ave. Brooklyn, New York	A confirmation for 2,000 shares of Imperial stock.
65	12/22/69	Bernard Weiss 1175 E. 59th St. Brooklyn, New York	A confirmation for 1,000 shares of Imperial stock.
66	12/22/69	Stanley S. Lane 103 Park Avenue New York, N. Y.	Confirmations for 1,300 shares of Imperial stock.
67	12/23/69	Steve Toback 1024 Banner Ave. Brooklyn, N. Y.	Confirmations for 2,000 shares of Imperial stock.
68	12/23/69	Bernard Weiss 1175 E. 59th St. Brooklyn, New York	Confirmations for 2,000 shares of Imperial stock.
69	12/23/69	Stanley S. Lane 103 Park Avenue New York, New York	Confirmations for 2,000 shares of Imperial stock.
70	12/24/69	Murray H. Taylor 103 Park Avenue New York, New York	Confirmations for 10,000 shares of Imperial stock.
71	12/26/69	Stanley S. Lane 103 Park Avenue New York, N. Y.	Confirmations for 1,000 shares of Imperial stock.
72	12/26/69	Murray H. Taylor 103 Park Avenue New York, N. Y. 10017	Confirmations for 10,000 shares of Imperial stock.

(Title 18, United States Code, Sections 1341 and 2.)

. . . . . .
Foreman

. . . . . .
Whitney North Seymour, Jr.
United States Attorney

Notice of Motion for Stay of Trial

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

73-2128

CARMINE TRAMUNTI,

Petitioner,

against

HONORABLE ARNOLD BAUMAN, United States District Judge for the Southern District of New York; PAUL J. CURRAN, United States Attorney for the Southern District of New York; and the UNITED STATES OF AMERICA,

Respondents.

SIRS:

PLEASE TAKE NOTICE, that upon the petition herein, with exhibits thereto annexed, and the annexed affidavit of Murray J. Chikofsky, petitioner will move this Court, on the 14th day of August, 1973, at 10:30 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, at Room 1705, United States Court House, Foley Square, New York, New York 10007, pursuant to Title 28, United States Code §1651, and Rules 21 and 27, Federal Rules of Appellate Procedure, for an order temporarily enjoining, restraining and staying the further prosecution and the trial of petitioner under the indictment in Docket No. 73 Cr. 514, presently pending in the United States District Court for the Southern District of New York, pending the hearing and final determination of the petition

herein, and granting unto petitioner such other and further relief as to the court may seem just and proper.

Dated: New York, New York
August 2, 1973

Yours, etc.,

FRIEDMANN, FISCHMAN & CHIKOFSKY
Attorneys for Petitioner

By: MURRAY J. CHIKOFSKY
MURRAY J. CHIKOFSKY
A member of the Firm
Office & Post Office Address
3 West 57 Street
New York, New York 10019
212 688-8212

To:

PAUL J. CURRAN, ESQ.,
United States Attorney
United States Court House
Foley Square
New York, New York 10007

Affidavit of Murray J. Chikofsky in Support of Motion for Stay of Trial

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

[SAME TITLE]

State of New York
County of New York—ss.:

MURRAY J. CHIKOFSKY, being duly sworn, deposes and says:

1. I am a member of the firm of Friedmann, Fischman and Chikofsky, attorneys for petitioner herein, and I respectfully submit this affidavit in support of the motion of petitioner, pursuant to Title 28, United States Code §1651, and Rules 21 and 27, Federal Rules of Appellate Procedure, for an order temporarilry enjoining, restraining and staying the further prosecution and the trial of petitioner under the indictment in Docket No. 73 Cr. 514, presently pending in the United States District Court for the Southern District of New York, pending the hearing and final determination of the petition herein.

2. Annexed hereto and made a part hereof is a copy of the petition for a writ in the nature of a writ of prohibition, together with the exhibits annexed thereto, filed in this Court, addressed to the respondents named therein. The attention of the Court is respectfully invited to the contents of said petition and exhibits.

3. As appears from said petition the prosecution of petitioner under the indictment in Docket No. 73 Cr. 514,

in the district court, is now in progress. Petitioner contends that such prosecution is in direct violation of the constitutional provision contained in the Fifth Amendment to the Constitution of the United States providing that no person shall be subject for the same offense to be twice put in jeopardy of life or limb. The rules of law of double jeopardy, collateral estoppel and res judicata, or by whatever other name or term such constitutional provision or rule of law is called, forbids the present prosecution of petitioner. See *Ashe* v. *Swenson,* 397 U. S. 436 (1970).

4. Also, as appears from the decision of the Supreme Court in the case of *Harris* v. *Washington,* 404 U. S. 55 (1971), it is appropriate and proper for petitioner to proceed by way of a petition for a writ of prohibition and for an alternative writ to dismiss the indictment. Thus, it would appear that this Court should entertain and consider this petition on its merits. The consequential effect of such procedure would be to preclude and forestall the trial of the aforesaid pending indictment, especially if petitioner should prevail on the merits of this petition.

5. The principal reason for bringing on this motion to enjoin, restrain and stay temporarily the further prosecution and the trial of petitioner under the aforesaid indictment, pending the hearing and final determination of the petition herein, is the judicial economy involved in such procedure. The facts of record in the first trial (70 Cr. 967) as related to petitioner, are identical to those sought to be proved in the second or perjury trial (73 Cr. 514). In these days of crowded dockets and long delays in the administration or justice, both civil and criminal, as well as the need to conserve and wisely utilize judicial man-

power, seems to impel the conclusion that duplicate trials of identical ultimate issues of fact should be avoided wherever possible. Moreover, the expense, hardship, uncertainty and harassment of a second trial to petitioner should also be considered by this Court in determining whether or not to enjoin temporarily such second trial while this petition is under consideration. The fact that the government now reports itself ready for such second trial should not be considered on this motion, especially since it has taken from December, 1971 to May, 1973, within which to perfect the new prosecution. It is the fact of having such second trial which is at issue herein.

6. It is respectfully submitted that this Court should grant this motion and thereupon require the respondents to submit their answers on the merits to the petition. It should also order and direct the filing with this Court by the respondents Paul J. Curran and the United States of America of a complete copy of the entire record of the first trial, including the complete trial transcript, exhibits, docket entries and all other proceedings of the trial of Docket No. 70 Cr. 967, held during October, November and December, 1971, in the District Court for the Southern District of New York.

7. The attention of the Court is invited to the fact that Judge Bauman has directed that the trial of 73 Cr. 514 is to be held commencing October 15, 1973. Since a proper consideration of this petition and the proceeding underlying it may not be concluded by such date, this is a further reason for directing a temporary stay of such trial until there is a final determination of this petition.

8. There has been no previous application made to this or any other court, or to any judge thereof, for an order temporarily enjoining, restraining and staying the further prosecution and the trial of petitioner under the indictment in Docket No. 73 Cr. 514 in the District Court for the Southern District of New York, pending the hearing and final determination of the petition herein.

WHEREFORE, it is respectfully prayed that this motion be granted in all respects.

MURRAY J. CHIKOFSKY

(Sworn to by Murray J. Chikofsky, August 1, 1973)

LIBRARY
SUPREME COURT, U. S.

No. 73-603

In the Supreme Court of the United States

OCTOBER TERM, 1973

CARMINE TRAMUNTI, PETITIONER

v.

HONORABLE ARNOLD BAUMAN,
UNITED STATES DISTRICT JUDGE FOR
THE SOUTHERN DISTRICT OF NEW YORK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-603

CARMINE TRAMUNTI, PETITIONER

v.

HONORABLE ARNOLD BAUMAN,
UNITED STATES DISTRICT JUDGE FOR
THE SOUTHERN DISTRICT OF NEW YORK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION

Petitioner seeks review of the denial by the court of appeals of his petition for a writ of prohibition or for an order directing the district court to dismiss the perjury indictment pending against him. His contention is that trial on the perjury indictment would constitute double jeopardy. His petition to this Court was accompanied by a motion for stay of trial, which was denied by Mr. Justice Marshall on October 5, 1973. Trial on the perjury indictment commenced on October 18, 1973, and on October 25, 1973, petitioner was convicted. His effort to forestall trial is therefore now moot. His double jeopardy contention can be heard in due course on appeal from his conviction.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

DECEMBER 1973.

DOJ-1973-12